SIVAJOTHI K SUPPIAH

v.

KUNATHASAN CHELLIAH

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: MT1-24-376-97]
15 DECEMBER 1999

FAMILY LAW: *Children - Custody - Welfare of child - Whether to be given paramount consideration - Factors to be considered - Law Reform (Marriage & Divorce Act) 1976, s. 88*

FAMILY LAW: *Financial obligation - Maintenance payments - Whether order should be made for arrears of maintenance - Law Reform (Marriage & Divorce Act) 1976, s. 93*

This was an application by the defendant/husband for the following orders: (a) that the order of the court dated 3 July 1997 be set aside on the following grounds, namely (i) wrong forum; (ii) non-disclosure; (iii) the wife had obtained full remedies; (iv) no provision had been made for access to the children by the husband; (b) that the defendant be given immediate custody, care and control of the three children; and (c) that the plaintiff be given reasonable access to the children.

The plaintiff on the other hand filed an application for an order that the defendant pay the plaintiff maintenance in the sum of RM21,956 for the three children from 3 March 1997 until the date of the filing of the originating summons *ie*, 3 July 1997, and that from 4 July 1997 onwards the defendant pay a monthly sum of RM5,489.

Held:

[1] The plaintiff had filed her application in the correct forum. At the time of the application, she was actually already in Ampang, Selangor with her parents, and due to urgency she wanted the matter to be dealt with immediately. Further, if the defendant was of the genuine view that the plaintiff had filed the application in the wrong forum it was incumbent upon him to make an application to transfer the case to the High Court in Johor Bahru.

[2] The plaintiff had stated the truth in her affidavit *ie* that her move to Selangor was due to the quarrels, violence, harassment and the cruelty of her husband. The children were not moved to Selangor for any selfish reasons but entirely to give them a good education and upbringing without them having to be victims of the high-handed, rude, violent, selfish and abusive behaviour of their father. Furthermore the plaintiff moved to Selangor and accepted a job with a substantially lower salary than that she was previously earning. There could not have been any ulterior motive for moving from Johor to Selangor.

[3] In matters of custody, care and control of a child, the paramount consideration shall be the welfare of the child. On the facts of the case, the following considerations were relevant: (a) the children being three young girls of tender age, the personal and intimate care of their mother would be necessary as they grew up; (b) matters relating to puberty and problems relating to physical and emotional changes would be best attended to by the mother instead of the father; (c) the mother's touch and physical proximity in time of illness; and (d) there would be no substitute for the natural love and affection of the mother.

[4] In this case joint custody was inappropriate for the following reasons: (a) the husband and wife had been engaged in persistent quarrels; (b) the husband had also inflicted physical injuries on the wife; (c) the wife and husband were not on talking terms.

[5] On the facts and circumstances of the case, the plaintiff should be granted custody, care and control of the children while the defendant should be granted weekly access to them.

[6] Section 93 of the Law Reform (Marriage & Divorce) Act 1976 provides that the court may at any time order a man to pay maintenance for the benefit of his child. The word 'maintenance' is a term of a very wide scope. It signifies any form of material provision that will enable an adult to live a normal life and a child to be brought up properly.

[7] In ordering maintenance there is no rule of law limiting the arrears of maintenance. The court should decide based on the facts and circumstances of the case.

[Plaintiff's application allowed as amended.]

Case(s) referred to:
B Ravandran Balan v. Maliga Mani Pilai [1996] 2 MLJ 150 ***(refd)***
C v. C [1962] 4 FLR 461 ***(foll)***
Chan Bee Yen v. Yap Chee Kong [1989] 1 MLJ 370 ***(refd)***
Chan Kah Cheong Kenneth v. Teoh Kheng Yau [1994] 2 SLR 879 ***(dist)***
Gomez Nee David v. Gomez [1985] 1 MLJ 27 ***(foll)***
Helen Ho Quee Neo v. Lim Pui Heng [1974] 2 MLJ 51 ***(refd)***
J v. C [1970] AC 668 ***(refd)***
K Shanta Kumari v.Vijayan [1986] 2 MLJ 216 ***(refd)***
Kok Yoong Heong v. Choong Thean Sang [1976] 1 MLJ 292 ***(refd)***
Leow Kooi Wah v. Philip Ng Kok Seng & Anor [1997] 3 MLJ 133 ***(foll)***
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 ***(refd)***
Marimuthu v. Thiruchitambalam [1966] 1 MLJ 203 ***(refd)***
Masam v. Salina Saropa & Anor [1974] 2 MLJ 59 ***(refd)***
Milliken-Smith v. Milliken-Smith [1970] 2 All ER 560 ***(refd)***
Re Borthwick (deceased); Borthwick & Anor v. Beauvais & Ors [1949] 1 Ch 395 ***(foll)***
Re Orr [1972] 2 DLR 77 ***(refd)***
Thevathasan v. Thevathasan [1960] MLJ 255 ***(not foll)***
W v. H [1987] 2 MLJ 235 ***(refd)***
Yong May Inn v. Sia Kuan Seng [1971] 1 MLJ 280 ***(refd)***

Legislation referred to:
Guardianship of Infants Act 1961, s. 11
Law Reform (Marriage and Divorce) Act 1976, ss. 88, 89(2)(e), 93

Other source(s) referred to:
Bromley's Family Law, Prof BM Bromley & NV Lowe, 1987, 7th edn, p 328
Family Law Cases, Materials and Commentary, Dr HA Finlay, Prof AJ Bradbrook & Prof Rebecca J Bailey-Harris, 1993, p 389
Family Law in New Zealand, 1993, 6th edn, 310

For the plaintiff - Peter Raj (Ramesh NP Chandran with him); M/s PI Raj & Co
For the defendant - NA Kumar; M/s Nijar, Kumar, Netto & Partners

Reported by Mariette Peters-Goh

JUDGMENT

Faiza Tamby Chik J:

The defendant/husband filed a summons in chambers application dated 30 July 1997 ("encl. (6)") and prayed for the following orders:

(i) that the order of the court dated 3 July 1997 be set-aside;

(ii) that the defendant be given immediate custody, care and control of Venothini Kunathasan Chelliah, Gayithiri Kunathasan Chelliah and Meera Kunathasan Chelliah;

(iii) that the plaintiff be given reasonable access to the children.

Briefly the background of the case is as follows: The plaintiff/wife is an accountant and the defendant/husband is a public accountant and has his own accounting/audit firm under the name of Chelliah & Associates in Johor Bahru. Both are professionals. The parties were married at the Civil Registry of Marriages in Johor Bahru Darul Takzim on 1 November 1987 followed by a Hindu Ceremonial Marriage in Johor Bahru on 1 February 1988. The three (3) children born out of this marriage are:

(1) Venothini Kunathasan Chelliah born on 7 February 1990 (now aged about nine years);

(2) Gayithiri Kunathasan Chelliah born on 2 November 1993 (now aged about six years);

(3) Meera Kunathasan Chelliah born on 24 March 1995 (now aged about four years).

The important fact to note in the instant case is that both the plaintiff/ wife and the defendant/husband have a long history of quarrels and irreconcilable and irretrievable differences. These had led to the wife being assaulted on numerous occasions not only by the husband but also by the husband's two brothers and mother. Details pertaining to the background and circumstances in respect of quarrels, violence, harassment and cruelty have been explained in the wife's various affidavits filed in this court.

As a result of all the above untold incidents the wife was living in constant fear of violence and harassment from the husband since she did not know when will the violence and harassment strike again so long as she remained in Johor Bahru. The house maid was also living in constant fear of assault by the husband. The wife's fear was further compounded by the wife's belief that if the husband took the children from the wife's house he will not return the children and she will be compelled to go to the husband's mother's house to take the children which will result in violence and assault again since the husband's mother and the two brothers were living five houses away from the husband's house in Johor Bahru. The wife was also convinced that the children being of tender ages of seven, three and two the constant quarrel, violence, harassment, fear of displacement caused by her husband was affecting them badly and it was not in their paramount welfare, health and interest for them to stay in Johor Bahru. In summary since the husband had driven the wife and the children out of his house since 3 March 1997, the violent conduct of the husband, his two brothers and mother had resulted in them living in constant fear of violence, assault

and harassment from the husband and his family members. As a result of the circumstances set out above the wife and her children and the maid left Johor Bahru and came to Selangor to stay with her parents before she proceeded to instruct her solicitors in Kuala Lumpur to take the appropriate legal action as this was in the best interest and welfare of the children.

Accordingly on 3 July 1997 the wife filed an *ex parte* originating summons in the Shah Alam High Court and obtained the following orders:

(a) that the wife be given immediate custody, care and control of her three children;

(b) the husband and/or his servants or agents or family members be restrained from taking possession, control or care of the three children from any place whatsoever;

(c) the husband and/or his servants or agents or family members be restrained from entering the wife's house at any time whatsoever;

(d) the husband and/or his servants or agents or family members be restrained from threatening, assaulting or harassing the wife, the maid and/or the wife's children in any manner whatsoever; and

(e) the husband is at liberty to apply to this Honourable Court for any variations of these orders and such application shall be heard *inter partes* by this Honourable Court.

The husband has submitted that the order of the court dated 3 July 1997 ("the order") was not properly obtained and ought to be set-aside on the following grounds:

(a) Wrong forum;

(b) Non-disclosure;

(c) The wife obtained the full remedies;

(d) There was no provision for access to the children by the husband.

The wife's allegations of numerous physical assaults, violence and verbal abuses had been set out with sufficient particularity and clarity in her supporting affidavit dated 3 July 1997. The wife referred to six police reports lodged by her in respect of these physical assaults and violence and to two medical reports issued by the doctors at the Johor Bahru General Hospital. Subsequently photographs of the wife having sustained severe injuries inflicted by the husband and his brother were exhibited. The acts of assaults and violence continued even though the wife and her three

daughters of tender ages were chased and driven out by the husband from the matrimonial home at 2.30am on 3 March 1997. The following are some of the glaring instances when the wife was threatened, pressured, humiliated, abused and physically assaulted. They are:

(i) On 22 February 1997 the husband initially in refusing to allow the plaintiff and the three children to go to the temple pulled his wife's sari and began removing the children's clothes as well. Upon returning from the temple the husband became more violent and pulled the wife's wedding chain (thali) which snapped;

(ii) On many occasions the wife was subjected to constant physical abuse and violence by the husband which had caused the wife bruises and physical injuries. As a result of these physical abuses and violence by the husband the wife had lodged various police reports the details of which are as follows:

(a) 19 March 1997 JBR No. 1662/97;

(b) 4 June 1997 JBR No. 11900/97 JD 7933;

(c) 25 June 1997 JBR No. 13575/97 SD 9691/97.

(iii) The husband's younger brother had also assaulted the wife on various occasion and various police reports to that effect had also been lodged by the wife the details of which are as follows:

(a) 27 June 1997 JBR No. 13738/97 SD 9855/97

(b) 28 June 1997 JBR No. 13790/97 SD 990/97

(c) 28 June 1997 JBR No. 13828/97 SD 9945/97

(iv) As a result of the husband's vicious assault on the wife she had to seek medical attention from the Sultan Aminah General Hospital for the extensive injuries she had sustained. The photographs of the injuries sustained by the wife as a result of the husband's assault are shown in exh. "S5". The photographs of the injuries sustained by the wife as a result of the defendant's brother's (Shanmugathasan) assault are shown in exh. "S7".

When after being driven out of the matrimonial home the wife and the three children were staying separately in a four bedroom double storey terrace house at 3 Lembah Dua, Taman Tasek, 80200 Johor Bahru the husband had been relentlessly harassing the wife and creating a lot of unrest and trauma on the children. Some of the glaring instances of the husband's constant harassment are as follows:

(a) On 31 May 1997 the husband took the children with the wife consent and agreed to return the children on Sunday 1 June 1997. He refused to return them on 1 June 1997 but only returned the children about 10.30pm on 2 June 1997 causing great anxiety to the wife;

(b) On 3 June 1997 the husband trespassed into the wife's home, threatened the maid and took the children without the wife's consent and in her absence;

(c) On 4 June 1997 the husband came to the wife's house in her absence and shouted and banged the gate. When the wife's maid called the wife while she was at work she had to rush home to attend to the matter thus affecting her work;

(d) On 20 June 1997 the husband fetched the children from the McDonald Restaurant in Johor Bahru and agreed to return the children on 22 June 1997. The husband refused to return the children as promised but only returned them on 23 June 1997 at about 10.45pm and the children only slept at about 12.30am the following day;

(e) On 25 June 1997 the husband came to the wife's house, threatened the maid and took the children without the wife's consent and in her absence. The husband only returned the children at 9.45pm and they only slept past 12 midnight;

(f) On 26 June 1997 the husband again came to the wife's house to take the children without the wife's consent and in her absence. The husband refused to return the children on that day;

(g) On 27 June 1997 the wife had to go to the husband's mother's house to fetch the children but she was subjected to violence and harassment before the wife could take the children.

I have no reason to disbelieve this long account of the ordeal.

Wrong Forum

At the time the wife filed the *ex parte* originating summons at the Shah Alam High Court on 3 July 1997 the wife was already in Ampang, Selangor with her parents. The wife's solicitors are in Kuala Lumpur and due to urgency she wanted to have this matter dealt with immediately. Further if the husband was of the genuine view that the wife had filed the application in the wrong forum it was incumbent upon him to make an application to transfer the case to the High Court in Johor Bahru. The failure of the husband to do so had not been explained. The wife had in her oral evidence clearly explained the background and circumstances that

forced her to move her home to Selangor. There has been a long history of violence, quarrels, harassment and cruelty perpetrated by the husband on the wife resulting in injury to the mind and body of the wife and continuous harassment to the children and the maid. In the case of *Marimuthu v. Thiruchitambalam* [1966] 1 MLJ 203 at p. 205 Gill J (as he then was) held that:

> It is not necessary for the wife to prove habitual ill-treatment. If she has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case the husband, who is the guilty party, must maintain his wife. Causing a wife to leave by ill-treatment is tantamount to driving her deliberately from the home.

Consequently on 3 March 1997 the husband forced his wife and the three children to leave the matrimonial home. The wife had in her oral evidence stated that before she and the children were driven out by the husband she was asked by the husband to sign a letter, the contents of which is as follows:

> We, Sivajothi a/p K. Suppiah (I/C No. 5504945) and Kunathasan a/l Chelliah (I/C No. 4169736) agree to be divorced with immediate effect. In order that we go our separate ways immediately ie, on 3 March 1997, Sivajothi a/p Suppiah shall be allowed possession of the children until the divorce is finalised and the courts decide on which of the parents are most suited to bring up the children, and who has custody of the children.
>
> Signed by
> Kunathasan Chelliah
> and Sivajothi
>
> Witnessed by: Uthaya Jothi a/l Suppiah
> I.C. No. 3737492
> On this 3rd day of March 1997
>
> Also witnessed by: Shanmughathasan a/l Chelliah
> (I.C. No. 641103-01-5871)
> On this 3rd day of March 1997.

The above letter is clear and unequivocal in its terms. The husband had never at any time written any letters either by himself or through his lawyers to state that this letter was written under duress or otherwise.

After the wife and her three daughters were forced out of the house on 3 March 1997, the wife was physically assaulted on occasions not only by the husband but also by the husband's two brothers and mother. The following are some of the glaring instances when the wife was threatened, pressured, humiliated, abused and physically assaulted:

(1) On 22 February 1997 the husband initially in refusing to allow the wife and her three daughters to go to the temple pulled the wife's sari and began removing the children's clothes as well. Upon returning from the temple, the husband become more violent and pulled the wife's wedding chain (thali) which snapped. (pp. 570 of Bundle B).

(2) On many occasions the wife was also subjected to constant physical abuse and violence by the husband which had caused the wife bruises and physical injuries. As a result the wife lodged various police reports (p. 571 of Bundle B).

(3) The husband's younger brother had also assaulted the wife on various occasions. As a result the wife also lodged police reports. (pp. 571 and 572 of Bundle B).

After being driven out of the matrimonial home the wife and the three children were staying separately in a double storey terrace house at 3 Lembah Dua, Taman Tasek, 80200 Johor Bahru. Even here, the husband had continued harassing the wife and creating a lot of unrest and trauma on the children (pp. 576 to 579 of Bundle B).

As a result of the above untold incidents, the wife was living in constant fear of violence and harassment from the husband since she did not know when will the violence and harassment strike again so long as the wife remained in Johor Bahru. The wife also testified that the husband had even gone to the wife's office in Singapore and created an unpleasant scene. As stated earlier the wife was convinced that the constant quarrels and violence affect the children badly if they continue to stay in Johor Bahru and therefore, left Johor Bahru and came to Selangor to stay with her parents.

Non-disclosure

It is noted that the wife had stated in her oral evidence and in her affidavit that due to the quarrels, violence, harassment and cruelty of the husband on her, forced her to move to Selangor. Most important of all the children do not have to witness the father assaulting and abusing their mother. It can be seen that the children were not moved to Selangor for any selfish reason of the mother but entirely to give the children a good education and upbringing without the children being victims of the high handed, rude, violent, selfish and abusive behaviour of the father, all the more so when the three children are girls of tender ages. The husband has caused enough disturbance to the wife and the children, to make it urgent and necessary that the children be moved quickly into an environment and climate conducive to their health, education, peace of mind, religious upbringing,

community ties and emotional stability thus making the choice of Selangor in the interest and welfare of the children. The wife stated in evidence that at the time she obtained the *ex parte* order she had already moved to Selangor. She also explained in evidence that she had to go back to Johor Bahru/Singapore to give proper notice of resignation, to complete her unfinished assignments, hand over the job to the new executive and to make proper schooling arrangements for the children. The wife produced testimonials from Crown Pacific (exh. P10) and Kempas Heights (exh. P11) dated 8 August 1997 and 5 August 1997 respectively which were obtained for the purpose of rebutting the husband's allegation in his affidavit in support dated 30 July 1997 (p. 455 para. 5.2 of Bundle B) of the wife's insubordinate behaviour with her departmental head. Moreover the testimonials from the wife's previous employers, exh. P10 and P11 was unchallenged by the husband and his counsel. It is noted that the wife had already made several applications to seek employment in the month of May 1997 onwards but was only able to obtain employment in the month of October 1997. It must be emphasised here that the wife was earning a salary of S$3,700 per month which is equivalent RM8,140 per month (at the exchange rate of RM2.20 to a Singapore Dollar). Due to the cruelty by the husband which the wife could not bear anymore, she had to move to Selangor and accept a job at a substantially lower salary of RM3,500 per month. Her new salary was less than half her previous salary. No mother with three children would leave Johor Bahru to take a lower paying job for the purported reasons alleged by the husband. The wife having been the head of the finance department in her previous employment is only carrying out her professional duties by completing her unfinished assignments with her previous employer and to smoothly and responsibly hand over the duties to the new executive. It must be pointed out that it was the husband who called the wife's brother to drive the wife and the children away from the matrimonial home as the husband wanted to divorce her. Accordingly, the wife and the husband signed a letter on 3 March 1997 whereby the husband allowed the wife to have possession and custody of the children immediately.

The husband's conduct which forced the wife to move to Selangor as a result of the circumstances of violence, cruelty and harassment did not have the effect of totally depriving the children of sustained and continued society of their father. The husband was given reasonable and fair access to the children. Given the factual matrix of this case and the history of frequent quarrels, violence and cruelty, the husband cannot have the best of both worlds. The husband has only himself to blame for his present predicament. It is obvious during the testimony before this court that the husband only found excuses to blame the wife and her relatives and

potrayed himself to a saintly person; loving husband and caring husband and father. The wife had stated in her oral evidence that even after she was chased out from her matrimonial home she continued to stay in Johor Bahru for a period of five months by renting a separate house for the purpose of wanting the children to be in the continued society of their father. However, as a result of the continued harassment and violence by the husband and his family members even after being driven out of the matrimonial home it became intolerable for the wife and the children to say in Johor Bahru. In the circumstances the wife was forced to move to Selangor. Therefore, I am of the view that the wife never intended to deprive the children of the sustained and continued society of their father.

In matters of custody, care and control of the three daughters, s. 88 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) is relevant and it reads as follows:

(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express on independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

The phrase “paramount consideration” and “welfare of the child” were judicially interpreted and consist of several factors. The relevant factors are as follows:

The Overriding Consideration Is The Welfare Of The Children

In the case of *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189 at p. 193 Raja Azlan Shah CJ (as he then was) held:

> In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate. The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare.

The above case of *Mahabir Prasad v. Mahabir Prasad* was also followed in the case of *B. Ravandran s/o Balan v. Maliga d/o Mani Pillai* [1996] 2 MLJ 150 as to the issue of the welfare of the child being the first and paramount consideration, it was dealt with by the House of Lord in the case of *J v. C* [1970] AC 668 where Lord MacDermott held as follows:

> The second question of construction is as to the scope and meaning of the words "... shall regard the welfare of the infant as the first and paramount consideration." Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

The Mother Is Usually Given Custody Of Young Infants

This principle was enunciated in the case of *K Shanta Kumari v. Vijayan* [1986] 2 MLJ 216 at p. 218 where Wan Yahya J (as he then was) held that:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else. In *Kades v. Kades* [1961] 35 ALJR 251 the High Court in a joint judgment stated:

> What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together.

In *Re Orr* [1972] 2 DLR 77 Muloch CJ commented:

> In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ...

The Welfare Of The Child Includes The Moral And Physical Well Being

The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years. In the case of *Kok Yoong Heong v. Choong Thean Sang* [1976] 1 MLJ 292 at p. 293 it was stated that:

> The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years. See *Satpal Singh, an infant* [1958] MLJ 283. Further, in the case of *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 MLJ 51, the Court of Appeal Singapore held that all relevant factors have to be considered including the conduct of the parties and their characters, bearing in mind that the welfare of the child is the first and paramount consideration.

The Children Have The Right To Their Mother's Love And Affection

In the case of *Yong May Inn v. Sia Kuan Seng* [1971] 1 MLJ 280 at p. 281 Sharma J in granting custody of three children to their mother held that:

> They have a right to their mother's love and affection and no one can do what a mother can do for her children. ...
>
> ... The children are all girls and although it is not absolutely essential that they should remain in the custody and care of their mother, they are bound to feel freeier in her company than in the company of their father and more particularly so when one of them is reaching an age when she may need the advice of her mother most.

Children Of Tender Years Should Have The Benefit Of Being Brought Up By Their Own Mother Rather Than Grandmother

In the case of *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 MLJ 51 at p. 53 the Singapore Court of Appeal held:

> In our judgment, having considered all the facts, both disputed and otherwise, the proper order to make was to reverse the order for custody made by the judge and order that the appellant should have custody, including care and control over the child and responsibility for its upbringing. This would ensure that during his tender years he would have the benefit of being brought up by his own mother as opposed to being brought up in a haphazard way by others to whom the respondent might feel disposed to entrust his upbringing.

As A Matter Of Human Sense An Infant Is Better With Its Mother And Needs A Mother's Care

In the case of *Masam v. Salina Saropa & Anor*. [1974] 2 MLJ 59 at p. 60 the High Court held that:

> Every case must plainly be determined upon the particular circumstances affecting that case, though, it is of course, true to say that as a matter of human sense an infant is better with his mother and needs a mother's care ...

This principle was followed in the case of *B. Ravandran s/o Balan v. Maliga d/o Mani Pillai* [1996] 2 MLJ 150 at p. 157 Haidar Mohd. Noor J (as he then was) held:

> I do not think the love and care of the unmarried niece or, for that matter, of the grandmother, would be the same as that of the natural mother. The four children have been living with the respondent all these years and I do not think it is appropriate that their togetherness should be disturbed because of the matrimonial problems of their parents. They are still very young. However, I am not suggesting that the petitioner has no love for his children. He has the financial means to make them happy, but that is not the criteria for my consideration on the custody issue.

The Conduct Of The Parties Is Also Relevant

In the case of *Chan Bee Yen v. Yap Chee Kong* [1989] 1 MLJ 370 at p. 373 Peh Swee Chin J (as he then was) held:

> The last factor I had to consider was the conduct of the parties bearing in mind the paramount consideration of the infant's welfare. While the wife complained of lack of any love or affection from the husband, both seemed to accuse each other of being hot-tempered. More probably than not, I found that a lot of their marital problems could have been avoided if the husband had provided a matrimonial home away from her in-laws. Apparently the home

of the husband's parents was not regarded by her as such, and in my view for good reasons. She had to live with the relatives of the husband; this was bound to produce a great deal of tension and unhappiness. In my view the husband was certainly aware of the desirability to so stay away and any failure to take such step was conduct which was questionable and the wife's complaint on this score was entirely justifiable. The hot temper which the wife was said to have could equally be attributed to the husband, for both parties naturally exhibited it when they quarrelled with each other.

There Is A Rebuttable Presumption That It Is For The Good Of A Child Below The Age Of Seven Years To Be With His Mother

In the case of *W v. H* [1987] 2 MLJ 235 at p. 238 Shankar J (as he then was) held that:

They paramount consideration is always the welfare of the child and there is a rebuttable presumption that it is for the good of a child below the age of 7 years to be with his mother.

In General The Courts Dislike Separating Children

In *Bromley's Family Law* 7th edn, 1987 by Professor B.M. Bromley and N.V. Lowe at p. 328 it is stated as follows:

Keeping the children together.

In general the courts dislike separating children.

As Dunn LJ said in *Adams v. Adams* [1984] FLR 768, 772 CA:

All these cases depend upon their facts, but it is undesirable, other things being equal, that children should be split when they are close together in age and obviously fond of one another ... Children do ... support one another and give themselves mutual comfort, perhaps more than they can derive from either of their parents.

...

Occasionally this factor can be decisive ...

Therefore applying the above principles to the facts of the instant case, I hereby take into consideration the following matters:

(1) Both parents are working. (pp. 562 and 575 of Bundle B);

(2) The three daughters are all infants of seven, three and two years of age. (pp. 563 and 582 of Bundle B);

(3) When there is a living mother, professionally educated and devoted, loving and caring for her three daughters it makes no sense to give her daughters to the father for the purpose of the father's mother taking care of the three daughters;

(4) The grandmother herself is 72 years old and has her own medical problems and she herself needs a full time maid to look after herself. (pp. 397 and 398 of Bundle B);

(5) The husband despite the love and care for the three daughters has done the following things:

(a) chased his wife and her three daughters out of his house at 2.30am on 3 March 1997. (p. 394 of Bundle B);

(b) signed the letter dated 3 March 1999 agreeing to be divorced with immediate effect and allowed the plaintiff to have possession of the three children until the divorce is finalised. (p. 589 of Bundle B);

(c) never paid or contributed a single cent to the maintenance of the three daughters. (pp. 382 and 383 of Bundle B);

(d) never visited his three daughters when they were in the wife's brother's house. (pp. 382 and 383 of Bundle B);

(e) even to buy milk, milo for the children, the husband wanted 50% contribution before he will buy the milo and the milk for the daughters. Which loving father in today's society will do this? What the father had shown is that money is more important to him than the welfare of his three daughters; (p. 371 of Bundle B). The father had attempted to explain in his evidence in court that he is doing all these to save for – the future of his children. If the husband cannot provide for his children now what is there to provide for the future. This is a mere excuse;

(f) he never allowed the wife and the children to go to temple peacefully to worship. He pulled the wife's and children's clothing and even pulled the wife's wedding chain. (p. 570 of Bundle B);

(6) To leave the three daughters to the husband's mother house is not conducive or safe because:

(a) The husband's two brothers also live in the house; (p. 398 of Bundle B)

(b) one of them frequents the pub almost daily and returns home at times drunk and intoxicated; (p. 399 of Bundle B)

(c) the mother has no control on the two sons' behaviour; (p. 399 of Bundle B)

(d) it is inherently unsafe for the three daughters to be brought up in a house where two men having drinking habits. Consequences can be very severe and destructive.

(7) The husband himself is not suitable because:

(a) the husband has his own accounting practice and is very preoccupied; (p. 400 of Bundle B)

(b) he leaves for work at 9.30am and returns home at about 8pm daily; (p. 400 of Bundle B)

(c) he has not done anything in the past that makes him a capable father; (p. 401 of Bundle B)

(d) he does not involve himself with the eldest daughter school work but it is the mother who coaches her; (p. 401 of Bundle B)

(e) he has never paid or contributed a single cent to the maintenance of the three daughters; (p. 395 of Bundle B)

(f) he has taken the three daughters in the wife's absence one weekend and did not return them on the following week. (p. 402 of Bundle B)

(8) From oral and documentary evidence it is obvious for the last two years and four months the wife had struggled on her own:

(a) to maintain her own job with her own income;

(b) supported her three daughters entirely on her own without a single cent contributed by the father;

(c) although the mother is a working woman she has fulfilled her role quite well. She has to work to support the children and pay house rentals, etc. The husband cannot complain that the wife is working when he has not even provided a single cent in maintenance for the three daughters whom he claims he loves more;

(d) with the wife moving to Selangor/Kuala Lumpur and she is working in Selangor and the children also schooling in Selangor there will be less traffic jam compared to the traffic jam in Johor Bahru/Singapore causeway. Therefore the wife can be home much earlier and spend more time with her three daughters.

(9) What are the overriding factors? I am of the view that the overriding factors include the following:

(a) the children being three young girls of tender age require the personal and intimate care of the mother as they grow up;

(b) matters relating to puberty, problems relating to menstruation, physical, psychological and emotional changes can best be attended to by the mother and not by the father;

(c) the mother's touch and physical proximity in time of illness;

(d) there is no substitute for the natural love and affection of the mother.

Counsel for the husband had submitted that an order could be made giving both parents joint custody, but predicated on the fact that both parents stay in Johor Bahru for the sake of their love for their children. In support of this contention the husband's counsel cited the case of *Chan Kah Cheong Kenneth v. Teoh Kheng Yau* [1994] 2 SLR p. 879. The husband therefore submitted that the father would be better suited to see the need of the children during the week days. I am of the view that *Chan Kah Cheong's* case is inapplicable to the facts of the instant case and is distinguishable on the following grounds:

(i) *Chan Kah Cheong's* case did not involve a situation where the wife was chased out from the matrimonial home by the husband. Whereas in the instant case the husband had on 3 March 1997 chased the wife and the children out of the matrimonial home at 2.30am.

(ii) *Chan Kah Cheong's* case did not involve the signing of a document by the husband and wife whereby both agreed to be divorced with immediate effect and that in order they go their separate ways ie, on 3 March 1997 the wife was allowed possession of the children until divorce is finalised and for the court to decide who is most suited to bring up the children and who has custody of the children. Whereas in the instant case there is a document which was signed by the husband and wife to this effect;

(iii) in *Chan Kah Cheong's* case the two children, aged four and two, were taken away by the father from the matrimonial home without the mother's knowledge. Whereas in the instant case the wife and the husband signed a letter prior to the wife and the children being chased out of the matrimonial home in the presence of the husband and his family members;

(iv) unlike in the instant case, *Chan Kah Cheong's* case did not involve violence, harassment, and cruelty inflicted by the husband on the wife.

I am of the opinion that the following factors must also be taken into account as to why joint custody order is inappropriate. They are:

(1) the husband and the wife have been engaged in persistent quarrels and disagreement before and even now after the interim custody order which was granted by this court on 3 July 1997;

(2) the husband had also inflicted physical injuries on the wife through violence as evidenced by the various medical and police reports;

(3) even after the interim custody order was granted by this court on 3 July 1997 both the husband and the wife still had physical fights;

(4) the husband and the wife still have to go through their respective solicitors in respect of the place for fetching and returning of the children during weekly access;

(5) the wife and the husband are not on talking terms;

(6) additionally the potential hazards for children of shared parenting are best stated in *Family Law in New Zealand* 6th edn 1993 at p. 310 where it is stated as follows:

> The potential hazards for a child of shared parenting are best summed up by Gault J in the following passage:
>
> Any arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns. To reconcile these for the purpose of providing the child with stable and consistent support necessarily must involve substantial agreement and co-operation between the parents. These problems of course remain where children spend substantial periods of time with non-custodial parents exercising access rights. I think that difficulties are likely to be less when primary responsibility for the care of the child rests with one parent rather than both. *B v. VE* [1988] 5 NZFLR 65, 70.

Applying the principles of law applicable to custody of children as stated above, and on the peculiar facts of the instant case and given the history of persistent violence between the wife and the husband, joint custody would not be an appropriate order. Such an order will give rise to innumerable and unending problems.

It is noted that the wife has been employed in Petaling Jaya since October 1997 and has also set up a home with the children in Selangor. The children are all settled in schools in Selangor and through my interview of them and seeing their school report cards they are progressing well in

schools. The wife is on a salaried job whereas the defendant is self-employed and as such the husband can be flexible in his travel arrangements. Therefore it is more practical and realistic for the husband to travel to Kuala Lumpur to see the children. This is more so pursuant to s. 11 of the Guardianship of Infants Act 1961, where in exercising the powers conferred in this Act the court shall have regard primarily to the welfare of the infants and shall where the infant has a parent consider the wishes of the parent or both of them as the case may be. In the instant case counsel for the husband submitted that there would be a possibility of reconciliation and in reply counsel for the wife submitted that the wife has always encouraged reconciliation but if the husband was serious he would have done it long ago. The wife did make efforts to save the marriage but the husband had not made any genuine steps in that directions but merely proposed a settlement for maintenance and the relocation of the wife to Johor Bahru and nothing about reconciliation. I am of the view that nobody is stopping them from reconciling and I urgently encourage them to reconcile and be together for the sake of their three beautiful and intelligent daughters.

As to access to the husband in consequence of the order made by me on 3 July 1997 the parties were never able to agree as to the access period to be granted to the husband. As a result of which I had on 1 April 1998 made the following orders:

(i) that the husbahd be granted weekly access to the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah and Meera Kunathasan Chelliah from 3pm on Saturday to 10pm on Sunday;

(ii) the husband be granted access to the three children for two thirds of the short school term holidays and the wife shall have access to the three children for one third of the short school term holidays;

(iii) the husband and the wife shall each have half of the December school term holidays in respect of access to the three children; and

(iv) the wife and the husband shall arrange and confirm through their respective solicitors the place for the fetching and returning of the three children at least five days before the husband fetches and returns the three children.

But in 1999 there was a change in the school term holidays by the Ministry of Education. As a result of the change in the school term holidays I had on 13 January 1999 ruled that the school term holidays from 22 May to 6 June and from 20 November to 12 January, are long term school holidays

and therefore I ordered that the wife will take half and the husband will take the other half of these two long terms school holidays. With regard to the remaining short term school term holidays that is from 16 January to 24 January; 13 February to 21 February, and 4 September to 12 September the husband shall have two thirds and the wife one third of these short term school holidays.

At this juncture it is important to remind myself of the following factors which were brought to my attention during the course of this proceeding:

(i) the husband and the wife are not in talking terms;

(ii) even the place for fetching and returning of the children has become a subject matter for disagreement and unending squabbles;

(iii) it has been the practice of the husband that whenever he takes the children for the first part of the school term holidays he never returns the children on the agreed date. Usually he brings two or three days later and only after persistent calls from the wife and her family members;

(iv) the husband always returns the children between 11pm to 11.30pm on weekly basis on Sundays instead of returning the children at 10pm; thus resulting in the children going to bed late at about 1am on the following day and having to wake up by 6am in the morning to go to school;

(v) the husband without the knowledge or consent of the wife frequently comes to the wife's place of residence and takes away the children.

Finally counsel for the husband submitted that the court should prohibit the person given custody from taking the children out of Malaysia pursuant to s. 89(2)(e) of the Law Reform (Marriage and Divorce) Act 1976, and that the children's international passports which were currently deposited with this court be returned to the Immigration Department for cancellation. In reply counsel for the wife submited that there is no need to cancel the children's international passports as the same were made for the purpose of taking them for overseas holidays if the occasion permits by either the wife and/or the husband. I am in complete agreement with the submission by counsel for the wife. As to s. 89(2)(e) of the Law Reform (Marriage and Divorce) Act 1976, I am of the view that the section envisages a situation where a person who has been granted custody will abscond from Malaysia. In our case the wife had affirmed in her affidavit in reply dated 23 March 1998 (p. 16 Bundle A) that she has no intention whatsoever of bringing the three children overseas and keep them away from this jurisdiction of this court as the three children and the wife were born in Malaysia and their future is in Malaysia.

After considering all the circumstances of this case I would dismiss the father's summons in chambers application dated 30 July 1997 in encl. (6) with costs. Bearing in mind constantly that this is simply a case of the courts obeying the command of Parliament that the children's welfare is to be the first and paramount consideration, and therefore that the three daughters should continue to remain together in the custody of their mother. I hereby grant sole and full custody, care and control of the three daughters to the mother with weekly access to the father from 3pm on Saturday to 10pm on Sunday for the benefit of the said daughters who might miss their father very much and the further access to the said daughters for 2/3 of the short school term holidays to the father and for 1/3 of the short school term holiday to the mother. The father and the mother shall each have half of the December school term holidays of access to their said daughters. The father and the mother is to alternate each year the access to their said daughters for Deepavali from 6pm on the eve of Deepavali to 8am the day after Deepavali. As parties are still in disagreement and in order to facilitate a smooth access, it is hereby ordered that the father and the mother shall arrange and confirm through their respective solicitors the place for the fetching and returning of their said three daughters at least seven days before the father fetches and returns the said daughters. It is further ordered that the three daughters' international passports be returned to the mother for safe-keeping. In the event the father wishes to take the said daughters for overseas holidays (including Singapore) the mother shall give the said international passports to the father with an undertaking from the father that upon the return of the said daughters from their overseas holidays (including Singapore) the father shall return the said passports to the mother immediately. It is also ordered that the father or the mother is not allowed to take the said daughters out of Malaysia (including Singapore) for more than six weeks without the prior permission from the court.

The plaintiff/wife had filed a summons in chambers' application dated 25 March 1998 and prayed for the following orders:

1. that the defendant pay to the plaintiff maintenance for the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah and Meera Kunathasan Chelliah from 3 March 1997 till the date of filing of the Originating Summons No: MT1-24-376-1997 on 3 July 1997 for the sum of RM21,956;

2. that the defendant pay to the plaintiff maintenance for the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah and Meera Kunathasan Chelliah from 4 July 1997 onwards and for the future the sum of RM5,489 per month; and

3. such further or any other reliefs as this Honourable Court shall deem fit and proper to grant.

Section 93 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) provides as follows:

(1) The court may at any time order a man to pay maintenance for the benefit of his child:

(a) if he has refused or neglected reasonably to provide for the child;

(b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of any order placing the child in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

(3) an order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

The word "maintenance" is a term of very wide scope. If signifies any form of material provision that will enable an adult to live a normal life and a child to be brought properly. In the case of *Re Borthwick (Deceased); Borthwick and Another v. Beauvais and Others* [1949] 1 Ch. 395 at p. 401 Harman J held:

> It is said that maintenance is the only thing you can look at. What does that mean? It does not mean that you can only give the dependant just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only mere subsistence.

In the Supreme Court case of Victoria in *C. v. C* [1962] 4 FLR 461 at p. 466 Lowe, Dean Pape JJ unanimously held that:

a The word "maintenance" has a wide meaning. In *Acworth v. Acworth* (3) Scott LJ said: "... 'Maintenance' is a very wide word, and in my view it should be read as covering everything which a wife may in reason want to do with the income which she enjoys. It includes much more than food, lodging, clothes, travelling, and so on. It includes for instance, charity and making arrangements for the future, thus incurring various liabilities in her discretion, and it is wrong b to limit it to any particular form of expenditure." In *Re Borthwick* (4) Harman J. said, at p. 401: "Maintenance does not only mean the food a wife puts into her mouth. It means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that c must be so. Maintenance cannot mean only mere subsistence". See also *Kallin v. Kallin* (5). We do not doubt that medical and dental expenses would be proper objects of maintenance. As applied to children, we think an equally wide meaning should be given to the word.

We think it should be taken as including education on the scale or in the d manner directed by the court. We have passed a long way since 1796 when Lord Kenyon in *Hodges v. Hodges* (6) said: "Nothing could be recovered on account of the money paid for their education. A father was bound by every social tie to give the children an education suitable to their rank, but it was a duty of imperfect obligation, and could not be enforced in a court of law. The richest man in the kingdom might say to his heir apparent, 'Go and earn your e daily bread by your daily labour', and the law could not interfere. There is no further obligation than that which nature has implanted in his breast. The law obliges him to nothing but nurture, which duty expired when the child reached the age of seven" (7). See also Eversley, *Domestic Relations,* 6th ed, [1951], at pp. 368, 369.

f In our opinion, the learned judge was entitled to fix maintenance in respect of respondent and the daughter at the rates awarded, and we do not think we can properly interfere.

It is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past ie, during the existence of g the marriage. In *Family Law Cases, Materials and Commentary* by Dr. H.A. Finlay, Professor A J Bradbrook and Professor Rebecca J Bailey-Harris Butterworth 1993 at p. 389 it is stated as follows:

In determining the proper needs of the child, the child's standard of living is taken into account. In *Campbell and Campbell* [1988] FLC 91-960 the children h enjoyed an extravagant standard of living during the marriage to which the husband was opposed. After separation the wife applied for $100 per week per child maintenance plus the payment of extra expenses including school fees. The husband argued that he should not be required to contribute to the maintenance of that standard of living, and offered to pay $50 per week per i child plus the expenses. Lindenmayer J rejected the husband's argument, stating (at FLC at 76,953):

> I accept counsel for the wife's submission that on the evidence before me it is not established that it would advance the children's welfare to oblige them to enjoy a lower standard of living than that which they currently enjoy and have enjoyed during the marriage. I think that it is at least equally possible that to significantly reduce their standard of living now would be contrary to their welfare. In short, whatever personal views I may have about the appropriatenes of the standard of living provided for the children in the past by their parents, I am not satisfied that there would be any significant benefit to be obtained for them – that is the children – by imposing on them now a significant reduction in that standard.
>
> The net result of all that I have said about this matter is that, in my opinion, the only principle to be applied is that in assessing the financial needs of the children for the purposes of this maintenance application, I must have regard to the standard of living which the children have enjoyed in the past, the various ages and activities of the children, and their parents' expectations for them; and I should ensure that my order will provide for them a standard of living which is reasonable in all of the circumstances. On the facts of this case there is no basis upon which I could conclude that the welfare of these children calls for any significant reduction in their present standard of living.

In the Court of Appeal case of *Milliken-Smith v. Milliken-Smith* [1970] 2 All ER 560 at p. 561 Harman LJ held:

> the wife is not entitled, as a kind of professional matter, to look after the children, but the children do need looking after, and it cannot be in their interests that the person who does the looking after should be reduced to penury or have no means of subsistence at all. She must be kept alive and fit in order to perform her function as a mother. Therefore, the learned judge was quite justified, in my opinion, in awarding a sum for her.

I am of the view that based on the above principles and the wide meaning given to the word "maintenance" the husband's paramount duty to maintain the children covers a wide scope of benefits and interest.

On 4 July 1998 the husband was issued with a notice to produce the following documents:

(a) All Form J and income tax returns in respect of the husband's personal income tax and tax returns in respect of CA Corporate Consultants Sdn. Bhd. and Chelliah & Associates, Ten Yi Sdn. Bhd. for the years 1990 till June 1998;

(b) All of the husband's Bank Account Statement in respect of CA Corporate Consultants Sdn. Bhd. and Chelliah Associates, Ten Yi Sdn. Bhd, the defendant's personal bank accounts including all overdraft facilities both in Malaysia and overseas, and joint bank/loan account opened under Sivajothi a/p K. Suppiah and Kunathasan a/l Chelliah for the years 1990 till June 1998;

(c) All financial statements ("Profit and Loss Accounts and Balance Sheet as well as Fees Day Book and Cash Book") audited and unaudited in respect of CA Corporate Consultants Sdn. Bhd. and Chelliah & Associates, Ten Yi Sdn. Bhd. for the years 1990 till June 1998;

(d) Documents of ownership of all assets belonging to the defendant or held in trust for the defendant as well as in joint names of Sivajothi a/p K. Suppiah and Kunathasan a/l Chelliah in Malaysia and overseas;

(e) All credit card statement of accounts of the husband from June 1983 till June 1998;

(f) All shares belonging to the husband in Malaysia and overseas held personally by the husband or held in trust for the husband; and

(g) All records showing the husband's financial standing including assets held personally or held in trust for the husband. (pp. 600 to 602 of Bundle C).

It is observed that the husband has failed to produce the above mentioned documents thereby failed to make a full disclosure of his true financial position. Counsel for the wife submitted that the husband is a member of the Royal Sports Club, Golf Club and he is also a Freemason member and other clubs. On an average the husband and the wife spent a sum of RM1,000 per month when they took the children for weekly social and dinner functions. The children therefore have been exposed to this standard of living and have been enjoying thus. This is of paramount importance and duty for the husband to make the fullest disclosure of all relevant information in respect of his financial capability for maintaining the children. In the case of *Leow Kooi Wah v. Philip Ng Kok Seng & Anor.* [1997] 3 MLJ 133 at p. 143 Mahadev Shankar J (as he then was) held:

> I regret to say that both the respondent and Fifi were very reticent about producing the necessary documentation to satisfy the court as to what their true financial position was.
>
> Ms. Chew has correctly drawn the court's attention to the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'), especially rr. 61, and 65. The material words in r. 61(2) are as follows:

> 61(2) When a respondent ... is served with a notice ... of an application for ancillary relief ... he shall ... file an affidavit in answer to the application containing full particulars of his property and income, and if does not do so, the court may order him to file an affidavit containing such particulars.

and in r. 65(4) the words are:

> 65(4) Any party to an application for ancillary relief may by letter require any other party to give further information ... or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the registrar for directions.

I entirely agree with Ms Chew that these rules impose upon the parties a spontaneous duty to exercise the utmost good faith in making the fullest disclosure of all relevant information. The cases she cited of *J v. J* [1955] P 214 and *Livesey v. Jenkins* [1985] FLR 813 are very persuasive because rr. 73, 74 and 77 of the English Matrimonial Causes Rules 1977 are very similar. I quote with approval what Sachs J said in *J v. J:*

> ... where a husband is fully capable of and has had opportunity to explain those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain of, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour ...
>
> The effect has been that owing to the husband's grossly defective affidavit of documents, his failure to put before the court documents, the reticencies in his long examination-in-chief, and his complete omission to keep or produce (I know not which) books of account, there have been kept from the court vital facts which he ought to have made plain. His attitude, to my mind, has been throughout an attitude of 'catch me if you can'. In substance, he sought to give the impression of a man barely subsisting in a Nissen hut, and they to say 'disprove that and the consequent inferences if you can'.
>
> For a husband in maintenance proceedings simply wait and hope that certain questions may not be asked in cross-examination is wholly wrong.
>
> In the light, of this apparent misapprehension, it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when the evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings – in so far as such inferences can properly be drawn.

Counsel for the husband has contended that the wife had until 23 January 1998 maintained that she did not want maintenance for the children. In this regard the husband had referred to p. 583 of Bundle B and p. 211 of Bundle A. Counsel for the husband also submitted that the court should only consider maintenance for the wife's children from April 1998 ie, when the application was made. In reply counsel for the wife contended that when the wife first filed the originating summons supported by the affidavit, para. 35 of Bundle B at p. 583 was inserted because at that time she thought that she would be getting employment in Selangor with a salary of RM8,000 equivalent to what she was earning when she was employed in Singapore (ie, S$3,700 per month) and therefore she would be in a position to maintain the children. Furthermore, since the time the wife and the children were driven out from the matrimonial home on 3 March 1997 not a single cent was paid by the husband for the children's welfare, education and interest. It was under these circumstances that the wife stated that she did not intend or propose to seek any maintenance from the husband. It is noted that the wife did not state that she will never claim maintenance at all from the husband. Hence I am of the view that the father cannot abdicate his paramount responsibility to provide maintenance for his children. It is also noted that in para. 25.3(d) of the wife's affidavit was in response to para. 12 of the husband's affidavit affirmed on 18 August 1997 (see pp. 284 and 285 of Bundle A) where the husband stated:

> ... irrespective of the outcome of this application, I will provide for my children's needs and pay for their educational expenses. However, these will be provided directly to the children rather than through the Plaintiff.

It is observed that till to date the husband has not fulfilled his promise. Even in his oral evidence he confirmed that he had never paid a single cent to the children nor to the school even when he had visited the children in the school.

In *Leow Kooi Wah* case *(supra)* M. Shankar J (as he then was) said at p. 141:

> The real clue to the respondent's personality is his callous disregard of the financial requirements of the children.

Therefore in the instant case the husband cannot abdicate his paramount responsibility to maintain his children.

From a perusal of the bundles of documents filed in this court it can be said that the wife first intimation of maintenance of children was through her solicitors on 26 January 1998. From the time of 3 March 1997, when the husband drove the wife and the children from their matrimonial home

neither did he come forth on his own to exercise his responsibility to provide maintenance for his children. Furthermore, the husband did not fulfill his promise as stated in para. 12 of his affidavit affirmed on 18 August 1997 as mentioned earlier. The husband claimed that he had spent generously in the form of buying clothes, shoes, books, toys and others at a cost of not less than RM500 per month. But these so called generous items are never sent back with the children but only kept by the husband as confirmed by him in his oral evidence.

The husband through his solicitors *vide* their letter dated 4 February 1998 indicated that he will assume full responsibility for the following (pp. 730 to 731 of Bundle C):

...

(a) All schoolbooks and school uniforms for the years 1998 onwards. In this respect, kindly ask your client to make her claim, and the same will be disbursed accordingly;

(b) Our client shall pay for bus fares to and for school for both children;

(c) We note that since July 1997, our client has built up a reasonable wardrobe of new clothes for the children and now practises sending the clothes along with the children when they return to your client. This he will carry on doing, and expects your client to at the very least send the item back with the children for the duration that the children are with their father.

(d) Our client shall provide the children with daily allowances as follows:

Venothini RM2.00 per day

Gayithri RM1.50 per day

(e) Our client also undertakes to provide the following on a monthly basis:

2 tins of 1 1/2 kg Milo

2 tins of 2 1/2 kg Nespray-Milk

2 bottles of (1 liter each) Ribena

2 packets of breakfast cereals

1 box of 3 kg detergent

Kindly take note that the above arrangement is to take effect immediately, and our client will deliver the above by Sunday, 8 February, assuming the access for this weekend is agreed.

It must be noted that nowhere in the husband's affidavit is there any mention of the husband giving money for the purchase of meat, vegetables, fish and for other marketing items, Though these items are essential for the children, yet the husband did not provide for them. The husband has clearly demonstrated his accountant's mentality and not the mentality of a father by the quantity of provisions he undertakes to provide on a monthly basis. It is unthinkable for a father of his financial standing to so accurately and poorly quantify the number of tins, bottles, packets and a box of items for his children.

The husband's counsel contended that the wife ought not to be entitled to the claim for the period of March 1997 to March 1998 and in support of this contention, he cited the case of *Thevathasan v. Thevathasan* [1960] MLJ 255 where the date of commencement of the maintenance was altered to a date nearer the date when the respondent made the complaint to the magistrate. The principle in respect of the arrears of payments is that the wife is entitled to claim for arrears of maintenance. In the case of *Gomez Nee David v. Gomez* [1985] 1 MLJ 27 at p. 28, 29 and 30 Coomaraswamy J said:

> In restricting himself to one year's arrears, the learned Magistrate adopted apparently as binding on him the practice (in some cases called a "custom") of the English courts as laid down, amongst others, in the cases of *Pilcher v. Pilcher ('No.2)* and of *Luscombe v. Luscombe.*
>
> These cases referred to and followed in the Malaysian of *Amrick Lall v. Sowbaiavati.* The learned Magistrate said he believed the English and Malaysian practice was also being applied in the Singapore courts.
>
> Light on the *Pilcher* and *Luscombe* cases is shed by *Ross v. Person.* Here, an order by Magistrates for arrears of maintenance came up for review by way of case stated before the Family Division. Baker, P. quoted Lord Merriman in the *Pilcher* case:
>
> > Moreover, as a matter of practice but not of law courts which are asked to enforce orders of this sort, usually consider that there should be a time limit respectively. The custom in his Division is not to enforce arrears for more than a year backwards.
>
> Baker, P emphasized Lord Merriman's use of the word "usually". Later on, Baker, P went on to say:
>
> > This is not a matter which there is a rule of law; it is a rule of practice which is 'usually' followed. The court can consider whether in the circumstances of any given case it is right to follow the practice either in whole or in part.

He stressed this further, when later in his judgment he said that the one-year limitation was merely a matter of practice, "there being no rule of law".

Lately, J in agreeing with Baker, P said:

I would not want this decision to be taken by magistrates's courts as an indication that there was a universal absolute rule that justices should never go back further than the last year's arrears:

The Magistrate said that "there was nothing in the Women's Charter, Chapter 47 to negate the longstanding common law practice" of England.

The binding nature of English cases must be looked at against the context of the topic of law in question.

...

It is my view that the English' cases of *Pilcher* and *Luscombe* should not be followed in Singapore on the point of any rigid practice (if such be the case) of one year backwards. In any event, *Ross v. Perason*, decided after the 1970 amendment to the Matrimonial Proceedings (Magistrates Courts) Act of 1960, has considerably qualified those two cases.

...

In the light of what I have said, justice will be best done by my remitting this case back to the Magistrate so that he may decide how far back he should order arrears from the date of the complaint. He should do so without being bound by any English fetter of practice or custom of not ordering arrears beyond one year.

In the case of *Leow Kooi Wah v. Philip Ng Kok Seng* [1997] 3 MLJ 133 at p. 145 Shankar J (as he then was) clearly stated the period for which the maintenance can be claimed for and held:

In her final submission, the respondent's counsel was instructed to offer RM200 per month to the petitioner and his two children by her. This is a good indicator of the character of this man and the extent to which he has forced the hand of judicial intervention. From November 1988 till I made the interim order in September 1994, all he had paid was RM600. After interim judgment, he paid RM1,000. Then nothing. ...

The time has now come to assess what the final order should be for the maintenance for both petitioner and her children. Isaac is now 16 and Anne is 13. All of them have been disgracefully neglected by the respondent. Doing the best I can on the evidence I have heard, my final award for maintenance backdated to November 1988 is as follows:

(1) For the petitioner and her daughter from November 1988 till December 1990 @ RM1,000 per month 25 months	...	RM 25,000
(2) For January 1991 till September 1994 @ RM1,000 per month		
(The petitioner RM500, Isaac RM300 and Anne RM200) 45 months	...	RM 45,000
For October 1994 till end March 1997 @ RM1,500 per month (The petitioner RM750, Isaac RM450 and Anne RM300) 30 months	...	RM 45,000
		RM115,000
Less paid		1,600
Now due and payable with Immediate effect		RM113,400

I specifically order for the avoidance of any doubt that the petitioner may forthwith levy execution or take all other measures legally available to her to enforce recovery of this sum. The respondent's track record is so dismal that it is very likely that unless he is forced to, he will not pay. ...

What cannot be ignored, however, is that because of the respondent's disgraceful conduct, the arrears of maintenance have mounted up and it is high time to make amends.

It can clearly be seen from the case of *Leow Kooi Wah* mentioned above, that the court granted an award for maintenance payment by backdating the payment (arrears) in the following manner:

(a) For the petitioner and her daughter from November 1988 till December 1990 (which is two years and one month);

(b) For January 1991 till September 1994 for the petitioner and two children (which is three years);

(c) For October 1994 till end March 1997 for the petitioner and two children (which is three years).

The case of *Thevathasan v. Thevathasan* can be distinguished from our instant case *inter alia* on the following grounds:

(a) The respondent in the *Thevathasan's* case is a young woman with no children and therefore the question of maintenance for children does not arise;

(b) This case refers to a complaint made to a magistrate about the husband's failure to maintain her but the complaint was not about failure to maintain the children;

(c) This case was decided in Singapore as way back in 1960 and ever since then the law has discarded the ancient and outdated law on arrears of maintenance and has taken on a more dynamic, progressive, practical and realistic approach in awarding arrears in maintenance as shown in the Singapore case of *Gomez Nee David v. Gomez* [1985] 1 MLJ 27 and the Malaysian case of *Leow Kooi Wah v. Philip Ng Kok Seng* [1997] 3 MLJ 133 which were referred to earlier.

Therefore I am of the view that in the instant case the wife is entitled to claim arrears of maintenance payment from 3 March 1997 till this court makes the order for maintenance.

The husband's counsel also contended that the wife's claim in respect of costs for maintaining the children in the sum of RM6,584 per month is grossly exaggerated. It must be noted that the wife herself will be contributing a sum of RM1,095 per month and therefore the amount sought for in her SIC Application is RM5,489 per month. It is observed that the wife's claim is in light of the present cost of living and in line with the standard of living enjoyed by the three children prior to being driven out from the matrimonial home.

I am of the view that the husband's income can be gathered from the following documents:

(i) **Defendant's total income as per 'Borang J' for the Year of Assessment ("Y/A") 1996 declared:**

(a) under the defendant's name is (p. 406 of Bundle B)	...	RM100,000
(b) under the plaintiff's name is (p. 408 of Bundle B)	...	RM 36,000
Defendant's total income for Y/A 1996 is	...	RM136,000 =========

(ii) **Defendant's total income as per 'Borang J' for the Year of Assessment ("Y/A") 1997 declared:**

(a) under the defendant's name is (p. 695 of Bundle C)	...	RM160,000

(b) under the plaintiff's name is (p. 596 of Bundle C)	...	RM 30,000
Defendant's total income for Y/A 1997 is	...	RM 90,000

The husband had stated in his oral evidence that the sum RM100,000 as indicated in his 'Borang J' for the Year of Assessment 1996 was an estimated assessment and that this was under appeal. The husband had not produced any documentary evidence in his oral testimony that the sum of RM100,000 was an estimated sum and it was under appeal. Therefore, it is only proper this court to accept the figure of RM100,000 declared under the husband's name and the sum of RM36,000 declared under the wife's name by the husband, which is total amounts to RM136,000 (ie, RM11,333 per month) as his total assessable net income for the Year of Assessment 1996.

The husband had also given oral evidence and upon cross-examination had admitted that the Income Tax Form J was as follows after deducting the following expenses:

(i) that all utility (water, electricity, telephone) expenses in respect of his house are paid by his company and expensed out in his office accounts;

(ii) that books, newspapers and periodicals are paid by his company and expensed out in his office accounts;

(iii) that his car hire purchase instalments and interest charges (p. 689 of Bundle C at line 81 and 82) are paid by the company and are expensed out as depreciation and interest charges (p. 689 of Bundle C at line 49 and 50) in his office accounts;

(iv) that motor and travelling expenses are paid by the company and expensed out as expenses in his office accounts;

It is interesting to note and bear in mind that the husband claimed RM1,980 per month on child maintenance whilst with him. The husband further had in his oral evidence stated that he is now renting a single room apartment in Kuala Lumpur at a rental cost of RM1,000 per month and drives every week in order to have access to the children. Therefore he is claiming a total sum of RM3,680 for being with the children just four (4) days in a month (Saturday nights). The irony here is that the husband is prepared to spend RM1,000 to rent a single room in a luxurious apartment in Ampang, to spend just one day in a week in Kuala Lumpur. (In any

event it must be noted here the husband is now staying in an apartment in Taman Tun Dr Ismail which is jointly owned by him and the wife.) This shows that the husband is far from being impecunious and is very conscious of his own living standards that he should have equal regard to the living standards of his daughters for which they have enjoyed in the past.

It is also noteworthy that the husband is claiming a sum of RM1,500 in respect of car instalments and running costs. The husband has given evidence in his oral testimony and affidavit that the car instalment and its running costs are pre paid by the company and expensed out in the company account. Therefore income declared in 'Borang J' is after taking into accounts these expenses. Therefore the husband by claiming these items out of his disposable income is not being correct and truthful. The above income assessment is only with regard to Chelliah & Associates in which the husband is the sole proprietor. The income declared in 'Borang J' excludes the following:

> His associate company CA Corporate Consultant Sdn. Bhd. which is registered under the wife's name from which he has not shown any documentary evidence to the Court as to what is his declared income under this company. On page 15 of the husband's written submission the husband has stated that in March 1998 he had lost a major client (Johor Cultural and Sports Club) which contributed RM2,900.00 per month. It must be pointed out that this major client is under the accounts of CA Corporate Consultancy Sdn. Bhd. (page 698 of Bundle C) and hence has no relevance whatsoever on 'Borang J' assessment. The husband has also not shown any documentary evidence to the Court of his declared income under his investment company Ten Yi Sdn. Bhd. despite having referred to the said investment company in the Plaintiff's Affidavit at page 624 of Bundle C. The husband has also not shown any documentary evidence as to the income received from the joint property of the wife and himself.

In order to put the parties' stories in perspective it will be convenient at this point to note some of the circumstances that led the wife to move from where she was working originally that being Singapore and moved up to Selangor. The wife was working in the husband's firm from April 1995 to August 1996 (one year five months). During this period of employment in the husband's firm, the husband did not pay the wife any salary even though he agreed to pay RM5,000 per month and later had claimed that he spent that money on her behalf on household expenses. From August 1996 to 3 March 1997 (seven to eight months) the wife was unemployed. During this period the wife did not receive any income. On 3 March 1997, the husband drove the wife and the children out of the

matrimonial home. From 3 March 1997 till 6 April 1997 (one month and four days) the wife continued to be unemployed and was not receiving any income or receiving any maintenance for the children from the husband. In view of the fact that the wife and the children were not receiving any income from the husband from 3 March 1997, the wife was forced to seek employment and consequently commenced employment in Singapore on 7 April 1997. Therefore the wife was not earning any income for a total period of two years and one month before she commenced employment in Singapore on 7 April 1997. It is observed that the wife would love to work in Singapore and stay in Johor Bahru. However, even after she was driven out from the matrimonial home on 3 March 1997, she was always faced with harassment, violence, mental and physical torture inflicted by the husband and his family members. In these extreme circumstances, the wife was forced to move to Selangor.

After perusing the written arguments and oral submissions in respect of provisions for maintenance made by both parties, I allow the following items of monthly maintenance for the three daughters. However, in reaching the final figure I round it up to a sum of RM5,000 per month for maintenance of the three daughters from 4 July 1997 onwards. For the maintenance of the daughters from 3 March 1997 to 3 July 1997, I allow a round figure of RM20,000. The breakdown is as follows: (Final total is rounded up to RM5,000.)

(a) School/Education/Tuition:

Children's school fees and other school related payments –

Venothini	RM 25
Gayithri	RM 280
Meera	RM 260
Pocket money for three children @ RM60 per child	RM 180
Books/accessories/story books @ RM50 per child	RM 150
Transport costs for children to and from school	RM 300
Tuition for Mathematics and Bahasa Malaysia	

Venothini	RM 250
Gayithri	RM 150
Meera	RM 150
	RM1,745

(b) Extra Curricular Activities

Vocal and dancing classes for three children @ RM75 per child	RM 225
Speech & drama (for Gayithri)	RM 60
Pocket Money/Titbits and Transport for ECA	RM 175
	RM 460
(c) Children's clothing, shoes, toiletries and toys for three children	RM 600
(d) Food, marketing, vitamins and medical for three children	RM1,500
(e) Maid	RM 715
(f) House rental	RM1,400
Total	RM6,420
Less the wife's contribution is	RM1,095
Final Total	RM5,325

The mother's summons in chambers dated 25 March 1998 is hereby allowed as amended to a round figure of RM5,000 per month.

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b **This page is intentionally left blank**

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